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Liability of Railroad Company for Injuries to Children Caused by an Unfastened Turntable.

The question as to the liability of a railroad company for injuries to children caused by an unsecured and unguarded turntable upon their own land, with knowledge that children are in the habit of playing with it, is before the Supreme Court of Minnesota in the case of Patrick Keffe v. The Milwaukee and St. Paul R. R. Co. The lower court decided in favor of the company, mainly on the ground that the children were trespassers. See Stout v. Railroad Company, 2 Dillon, C. C. 294, in which the company was held liable under the circumstances there disclosed by the circuit court, whose judgment was affirmed by the U. S. Supreme Court. CENTRAL LAW JOURNAL, *ante*, p. 76.

The Doctor and Student.

The review which was printed in our last issue of Messrs. Robert Clarke & Co.'s new edition of this legal classic, has attracted considerable attention, and we have been several times asked "who is W. E. H.?" We take the liberty of stating that that notice was written by Prof. William G. Hammond. of the law department of the Iowa State University—an able lawyer and a ripe scholar. Prof. Hammond modestly sent the manuscript to the JOURNAL without his initials attached, and by a painful error of the assistant editor they were written at the end of the manuscript, W. E. H., instead of W. G. H. The attention of the reader who peruses that notice will be struck no less by the familiar and easy acquaintance with the book itself which Prof. Hammond exhibits, than by the excellent sense and scholarly taste with which it is written. Prof. Hammond writes to us that although he has written nothing for publication for three years past, yet he esteems it an honor to be numbered among the occasional contributors of this journal. It is an honor to us, and not to him.

Chief Justice Waite's First Decision.

Mr. Chief Justice WAITE delivered his first opinion on the bench of the Supreme Court on the 13th instant in the case of Tappan, collector of taxes at Chicago, v. The First National Bank of Chicago, from the Circuit Court for Illinois. The members of the bar who heard it, and his brethren on the bench, speak of it in eulogistic terms. Reverdy Johnson was complimentary in his remarks, both as to the merits of the opinion and the manner of delivery. The case presented the question as to whether the legislature of Illinois could, in 1867, provide for the taxation of owners of shares of capital stock of a national bank in that state, at a place within the state where the bank was located, without regard to their places of residence. The court below decided that a tax could not thus be laid, and the decree was against the collector. The decree is reversed by the Supreme Court, this court holding that shares of stock in national banks are personal property, under the national banking act. They are a species of personal property, say the court, which is in one sense intangible and incorporeal, but the law which creates them may separate them from the person of the owner for the purpose of taxation.

Railway Transportation of Live Stock.

Railway companies transport for thousands of miles nearly all the live stock of the country destined for distant markets. In the case of The Louisville, etc., R. R. Co. v. Hedges, reported 13 Am. Law Reg. (N. S.) 145, March, 1874, the Kentucky Court of Appeals considers the peculiar liabilities of carriers of live stock. There is an instructive note to the case by Judge REDFIELD. 1. It would seem that the authorities have settled the doctrine that a stock carrier may by special contract with the owner protect himself from all liability except that which arises from the carrier's own negligence. 2. Without any special contract to that effect, the carrier of live stock is not an insurer of safe transportation to the same extent as in the case of ordinary merchandise, and is not liable for such accidents as are necessarily incident to the transportation of live animals, that is, for damages caused by the inherent nature or "proper vice" of the animal, such as kicking, goring, etc., if the carrier has taken every reasonable precaution to prevent such accidents and damages by providing proper cars and appliances, and keeping the same in safe and proper condition. 3. Loss or injury to the animals, according to the opinion of the Kentucky Court of Appeals, when in the custody of the carrier, is presumptive evidence of his negligence; but when, by agreement between the owner and carrier, the owner takes charge of his stock during transportation, negligence must be proved to establish a liability on the part of the carrier, but the latter is still bound to provide proper cars, chutes, etc.

The Late John W. Edmonds.

This distinguished jurist died at his residence in New York city on the 5th instant. Judge EDMONDS' name is doubtless familiar to most of the lawyers throughout the country, not only from the fact of his acknowledged ability and purity as a judge, but also from the fact that his name has been frequently brought before the public in connection with his peculiar religious belief. He was a firm believer in spiritualism, and, as he supposed, held constant communication with departed friends. So far as we are aware, there never was any complaint that these vagaries, if such we may be privileged to call them, influenced in any degree his professional conduct. The following brief sketch of his life we take from the Daily Register:

"He was born in Hudson, in March, 1799, was graduated at Union College, in 1816, and in 1820 began the practice of law in his native city. In 1831 he was a member of the assembly from Columbia county. In 1832 he was elected to the senate from the old third district and served four years. In the legislature he was prominent as a debater. In 1837 Judge EDMONDS came to this city and engaged in the practice of his profession. In 1843 he was inspector of state prisons, and was successful in reforming discipline, and the old system of corporal punishment was exchanged for the present. In

1845 Judge EDMONDS was appointed a circuit judge, in 1847 he was elected to the Supreme Court, and in 1852 reached the Court of Appeals. He retired from the bench in 1853, and has since practiced law."

We may add that he published in 1869 a volume of his decisions at *nisi prius*, entitled Edmonds' Select Cases. The work of his life was, however, the edition of the Statutes at Large of New York, in five volumes, with elaborate notes.

Municipal Taxation of Rolling Stock.

The case of The City of St. Joseph against the Kansas City, St. Joseph & Council Bluffs Railroad Company, in which right was claimed to tax all the company's rolling stock in the city where the company's headquarters are, came up before Judge WAGNER, of the Missouri Supreme Court, for decision lately. The power was denied. Judge WAGNER said:

"The proposition is undoubtedly true that where a corporation has residence, their property of this description is liable to assessment and taxation if the law has prescribed no different rule and regulation on the subject. This notion of certain personal property following personal residence of a corporation is a legal fiction, but it is not an unbending and uncontrollable principle of law. It may be modified by the legislature. The rolling stock of the company is in a constant state of transit, and has no more real local existence in one county than another. A county through whose whole length it runs might well think that it had as much right to tax it as a city that it passed through but a mile or two at most, but both would have no right to levy tax, for that would be double taxation upon the same property. This machinery by which the road is operated is constantly passing from one to the other, the entire road, and to save all cavil and dispute in respect to it, it was perfectly competent for the legislature to say that it should become a part of the road itself and become property the same as the road, and that for purposes of taxation should be equally distributed through counties, cities or towns through which it passed, in proportion to its length in those respective localities."

As to the taxation of rolling stock and railroad property by municipalities, see cases cited, Dillon Munic. Corp. § 629, note.

Transfers of Municipal Subscriptions to Railroads.

The Supreme Court of Kansas has rendered a decision in the case of The Missouri River, Fort Scott & Gulf Railroad v. The County Commissioners of Miami County, reversing the decision of the lower court. The following is the syllabus:

1. Under the laws of 1862 the county commissioners could, without any specific legislation, and without any express authority of the voters, make a valid sale and transfer of stock in a railroad company belonging to the county and issued to it by such company in pursuance of a duly authorized subscription.

2. In making such sale the commissioners are the agents of the county.

3. Any sale may be avoided when accomplished by fraud on the part of the purchaser, or by collusion between the purchaser and agent.

4. Where both parties to an executory non-negotiable contract for the sale and transfer of personal property have failed to perform any of the stipulations of the contract, neither party can make the mere fact of non-performance ground for the interposition of a court of chancery to declare the contract null and void.

5. A court of equity will not declare a contract between two corporations, otherwise valid, void because the seals of the corporations are not affixed to it, but if necessary will rather compel the parties to affix their seals.

6. Mere inadequacy of price affords no ground to set aside a contract of sale, unless it be of so gross a nature and given under such circumstances as to afford a necessary presumption of fraud or imposition.

7. Where part of the consideration is money and part the doing of certain work within the specified time, proof that the cash consideration is grossly inadequate, without any showing as to the nature and value of the work to be done, raises no presumption of fraud or imposition.

Testimony of Defendants in Criminal Cases.

Chief Justice APPLETON, of Maine, is, it is well known, a warm advocate of the policy and justice of allowing defendants in criminal cases to testify in their own behalf. The law of Maine makes such defendants competent witnesses for themselves. In the Reed murder case, lately tried before him, the prisoner testified, and alluding to this circumstance the Chief Justice made, *inter alia*, the following remarks to the jury:

"The prisoner has been a witness. He is either innocent or guilty. If innocent, the truth is his only protection. Truth is one and eternal. All true facts are consistent with each other. There is no reason for his withholding the truth. There is every reason for its utterance. If guilty, if he utters truth, it necessitates his conviction. The resort of the criminal, then, in all cases, is or must ever be to falsehood, to evasion or silence. But falsehood to exonerate is evidence of crime. An innocent man does not resort to falsehood, for falsehood is evidence tending to show guilt. Each falsehood uttered by way of exculpation becomes an article of circumstantial evidence, of greater or lesser inculpatory force, as you may judge. The deceased, Ray, was last seen Tuesday night, 20th. His body was found on Wednesday, the 28th. The prisoner and Mrs. Ray were arrested. Were there any suspicions attaching to any one else? The prisoner was examined then under oath, at a time when every event was recent. His examination was reduced to writing, signed, and I suppose sworn to by him. With a charge of murder resting upon him, you will consider whether he would affix his signature to any paper, or whether his vigilant counsel would permit him so to affix it, without full knowledge of its contents. He has been on the stand before you. As before remarked, statements of untruth, by way of defence, when proved to be untruths, at once become articles of circumstantial evidence, probative in their tendency of guilt."

Chief Justice Chase and his Biographer.

The late Chief Justice CHASE kept a diary from early manhood to the time of his death, and his biography by Judge WORDEN contains copious extracts from it, published with a bad taste that justifies the relatives of the deceased Chief Justice in their attempt to prevent his use of it. It will, however, no doubt make the book a great success from the publisher's standpoint. Among the entries from this diary which a biog-

rapher who possessed a proper regard for the great trust committed to him by his departed friend would never have allowed to see the light, is one dated September 12, 1862, in which Mr. CHASE expresses his opinions in language which would indicate that his disposition to complain had become chronic:

"Expenses are enormous, increasing instead of diminishing, and the ill-successes in the field have so affected government stocks that it is impossible to obtain money except on temporary deposit, and these deposits very little exceed——. We are forced, therefore, to rely on the increased issue of the United States notes, which hurts almost as much as it helps; for the omission of congress to take any measures to restrict bank note circulation makes the issue of these notes a stimulant to its increase, so that the augmentation of the currency proceeds by a double action and prices rise proportionably. It is a bad state of things, but neither the president, his counsellors nor his commanding general seem to care. They rush on from expense to expense and from defeat to defeat, heedless of the abyss of bankruptcy and ruin which yawns before us. May God open the eyes of those who control us before it is too late!"

Perhaps, however, Judge WORDEN has proceeded with reference to the maxim *suppressio veri suggestio falsi*, and, like a witness upon the stand, has felt himself under obligations to the public and to the cause of impartial history, to tell the truth, the whole truth, and nothing but the truth. The above extract would seem in some degree to corroborate what has frequently been asserted, that the chief justiceship was a sort of honorable exile resorted to by Mr. Lincoln in order to relieve Mr. CHASE from duty in his cabinet.

The Supreme Bench of Minnesota.

Just before going to press we learn that the Supreme Court of Minnesota has been reorganized by the appointment of Hon. S. J. R. MCMILLAN, one of the associate justices, to be chief justice, vice Chief Justice RIPLEY, resigned. Chief Justice MCMILLAN has been for a number of years an associate justice of the court, and his promotion will give general satisfaction. To fill the vacancy occasioned by the promotion of Mr. Justice MCMILLAN, the governor has appointed GEORGE B. YOUNG, Esq., of Minneapolis, to be an associate justice. This appointment created considerable surprise to the bar and to the public, as Mr. YOUNG is quite a young man to be called to so exalted a position, being but thirty-five years of age. We are, however, informed by those who know him intimately, that he is a man of brilliant talents and of a judicial temperament, and that his conduct on the bench will justify the governor's choice. The only objection which has been made to his appointment, so far as we know, is his youth, and this is in his favor rather than otherwise. Many of the most brilliant and enduring achievements of the most noted men were performed in their youth. Examples like Alexander, Hannibal and Napoleon in arms, and Pitt and Patrick Henry in the forum, are only selections from a great multitude of like instances. Nor has it been on the field of battle or in the forum alone that great men have exhibited their greatness in their earlier years. The more tedious and plodding walks of the law have not been less prolific of such examples. BLACKSTONE wrote his great Commentaries when he was a young and briefless barrister. SMITH, author of the Leading Cases, died at thirty-six. Sir WILLIAM JONES wrote his famous work on Bailments when in his thirties. Coming nearer our own time, we find among the class-mates of Mr. Justice YOUNG, at Harvard University, or graduating at nearly the same time, MORSE, the distinguished author of Banks and Banking and of Arbitration and Awards; SCHOULER, author of Personal Property and Domestic Relations; BALCH, editor of Story's Equity Jurisprudence and of the second edition of Blackwell's Tax Titles; JOHN C. GRAY, Jr., late editor of the American Law Review and editor of Story on Partnership; and last, though not least, OLIVER WENDELL HOLMES, Jr., editor of the American Law Review and of the last and best edition of Kent's Commentaries. To these we may add ISAAC GRANT THOMPSON, who edits with such consummate skill and success the American Reports, the New York Supreme Court Reports and the Albany Law Journal, who is quite a young man, and MELVILLE M. BIGELOW, author of the Law of Estoppel—a book which we have never heard spoken of except in praise—scarcely above thirty. The fact is, young men, or men not far advanced in life—other things being equal—make the best judges as well as the best soldiers. The desire of winning an honorable name is always greater in youth than in old age. If the accumulation of knowledge and experience is not as great, the intellect is clearer, while it is in early life alone that one possesses the physical vigor equal to the great labors of the judicial office. No one understood this better than Mr. WEBSTER when he recommended Mr. B. R. CURTIS, then about forty, as the successor of Mr. Justice STORY in preference to RUFUS CHOATE, and placed his preference upon the sole ground that Mr. CURTIS was a young man.

Removal of Causes from State to Federal Court under the Act of 1867—Time when Petition for Removal must be Filed.

The act of congress of 1867, in respect to the removal of causes from the state court to the federal court, contains the provision that upon filing the required affidavit of prejudice or local influence, the petition for the removal may be filed "at *any time before the final hearing or trial* of the suit." This language has been recently construed by the Supreme Judicial Court of Massachusetts, and viewed in the light of the anterior legislation of congress upon the same subject, the court reached the conclusion that under the act of congress of 1867, it was too late to apply to remove a cause after a trial in the state court on the merits, although such trial resulted in a disagreement of the jury. Chief Justice GRAY, who delivered the opinion of the court, says: "'Trial' appropriately designates a trial by jury of an issue which will determine the facts in an action at law; and 'final hearing,' in contradistinction to hearings upon interlocutory matters, the hearing of the cause upon its merits by a judge sitting in equity." "The whole effect of the change of the statute [of 1867] in this respect seems to us," he adds, "to have been to allow the defendant the same time to elect whether he will remove the cause into the federal court, as he has to prepare for a trial at law or a hearing upon the merits in equity in the state court; * * * but not to allow him, after the experiment of entering upon one such trial or hearing in the court in which the suit is commenced, to transfer the case to another jurisdiction." * * * "It follows that, when the plaintiff went to a trial upon the merits of this action in the

Superior Court, his right to remove the case into the Circuit Court of the U. S. ceased, and was not revived by the failure of the jury to agree, nor would it have been if a verdict had been returned by them and set aside by the court;" and by parity of reasoning it would not be if the judgment had been reversed by the Supreme Court of the state and the cause remanded for a new trial. This construction of the act of 1867 conflicts with that given by Mr. Justice MILLER in Johnson v. Monell, Wool. C. C. R. 390, who held that the cause might be transferred after a verdict had been returned and set aside by the court. The opinion of the Supreme Judicial Court of Massachusetts will be found reported in the March number, 1874, of the Am. Law Register, 137, with a note from the pen of Judge REDFIELD. Judge REDFIELD seems inclined to the opinion that the application for the removal may be made at any time before the *final* trial, where more than one for any reason should occur. It seems to us that this is the fair and natural construction of the act, and we doubt whether the more restricted view of the Massachusetts court will be approved by the Supreme Court of the United States. In Waggener v. Cheek, 2 Dillon, C. C. 565, it was held that it was too late in an equity cause to apply in an appellate court for its removal, although in one sense the *final* hearing had not been had. See also upon the subject here discussed: Ackerly v. Vilas, 24 Wis. 165; Waggener v. Cheek, *supra*, and cases cited; Home Life Ins. Co. v. Dunn, 20 Ohio State, 175; Dart v. McKinney, 9 Blatchf. C. C. 359; Adams Express Co. v. Trego, 35 Md. 47; Johnson v. Monell, *supra;* Grover & Baker Sew. Mach. Co. v. Florence Sew. Mach. Co., Supreme Court U. S., Dec. 1873, and cases cited by Mr. Justice CLIFFORD.

Cases in this Number.

We publish in this number a well-considered opinion of the Supreme Court of Tennessee upon the question of the liability of an express company for goods captured by an armed force in time of war. The opinion is also important from the fact that it declares and illustrates the principle that in expounding contracts with common carriers the courts will look to the circumstances surrounding the transaction, and to the course of business of the company and the shipper, as well as to the contract itself. The statement of the facts as given in the opinion of the court involves the case in some obscurity, from the fact that it does not show who C. B. Buckly was. If, as seems probable, this name, which occurs twice in the opinion, is a clerical error for J. C. Buckles, then the whole case becomes clear. For this opinion we are indebted to Hon. Joseph B. Heiskell, attorney-general of Tennessee, and reporter of the supreme court of that state.

Our readers in the seaboard cities who practice in the courts of admiralty will be interested in the two opinions which we publish, expounding those provisions of the shipping act of 1872, which require contracts with seamen to be in writing and entered into with certain formalities through the intervention of a shipping commissioner, and which prescribe penalties for the shipment of seamen by parol contract. The act would not, perhaps, have been difficult of construction were it not for the act of 1873, which repealed the stringent provisions of sec. 12 of the act of 1872 so far as they relate to voyages to the British North American possessions, the West Indies and Mexico. It will be seen that the opinions take opposing views of these statutes so far as they relate to such voyages. For the opinion of Circuit Judge WOODRUFF in the case of The City of Mexico, we are indebted to some unknown friend in New York City. For the opinion of District Judge LOWELL in the case of The Grace Lathrop, we are indebted to J. B. S. Thomas, Esq., of the Boston bar.

We add four pages to the JOURNAL this week to lay before our readers a very important and elaborate opinion of the Supreme Court of Indiana, expounding the statute of that state with reference to the liens of mechanics, laborers and materrial-men upon the building or structure erected or improvement made, where the contract was entered into with or the materials were furnished to a sub-contractor. Two points are ule d: 1. That the lien attaches notwithstanding the contract may have been made with or the materials furnished to a sub-contractor. 2. That if the lien is asserted within the time prescribed by the statute, it binds the property, although the owner in the meantime may have paid the contractor in full before receiving notice of the intention of the mechanic or materjal-man to rely upon the lien. The questions thus determined have, it is thought, arisen in nearly every state in the Union, and the decisions are by no means uniform. The case which we print was determined after very full argument by counsel interested in a number of cases involving the same questions. It affirms Barker v. Buell, 35 Ind. 297. The result is concurred in by the full bench, and the case will be decisive of a large number of others pending in that state. This opinion was furnished by our traveling correspondent, G. I. Jones, Esq.

We also an publish abridgment of a valuable opinion of the Supreme Judicial Court of New Hampshire, determining the important question of constitutional law that a fund granted by a state legislature to a municipal corporation can not be diverted or taken away by subsequent legislation.

Liability of Express Companies for Losses Incident to a Time of War—Power of Common Carriers to Limit their Liabilities.

L. OLWELL v. THE ADAMS EXPRESS COMPANY.

Supreme Court of Tennessee, Nashville, Feb. 7, 1874.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY, }
" ROBERT MCFARLAND, }
" JAMES W. DEADERICK, } Judges.
" JOHN L. T. SNEED, }
" THOMAS J. FREEMAN, }

1. **Liability of Common Carriers, etc.—Case in Judgment.**—During the late war the plaintiff resided in Nashville Tenn. He purchased goods in New York and had them shipped by the defendant's company, marked as follows, according to the express company's receipt: "L. Olwell, Nashville, care of J. C. Buckles, Louisville, Ky., which it is mutually agreed is to be forwarded to our agency nearest and most convenient to place of destination." The goods were duly carried to Louisville and received by Buckles, who paid the freight to that point, and again shipped them to the plaintiff at Nashville by the defendant's company, taking a receipt which provided against liability on the part of the company "for any loss or damage arising from the damages of railroad, steam or river navigation, leakage, fire, or from the acts of God or of the enemies of the government, mobs, riots or insurrections; pirates, or from any of the damages incident to a time of war, unless specially insured by them and so specified in this receipt, which insurance shall constitute the limit of the liability of the Adams Express Company in any event." It also contained an agreement on its back, relieving the express company from all liability as carriers, forwarders or bailees. This agreement was signed by C. B. Buckly, "per Memp," who was his clerk. The receipt did not show that the goods were specially insured. It was in proof that before goods could be shipped to civilians living as far south as Nashville, it was necessary to procure a "permit" from the United States treasury agent at Louisville, the goods passing through his hands. This the express company did not undertake to procure; but it was its

course of business to forward goods to Louisville only, where, upon the proper permit being obtained, the company forwarded them under a new contract to their destination. It was also in proof that Buckles acted as agent of the plaintiff to receive his goods at Louisville and forward them to Nashville. The train which carried the goods in question was attacked by a small band of armed men, and the goods were destroyed, and the plaintiff brings this action for their value. Upon these facts it is *held:*

(1.) **Interpretation of Contracts a Question of Law.**—That it was the duty of the court to determine the effect of the first contract of shipment, and not to submit its construction to the jury: but although the judge submitted the construction of the contract to the jury, yet as he afterwards, in charging the jury, expressed the correct view of its meaning, the error was thereby cured.

(2.) **Interpretation—Ambiguity.**—That the first contract being uncertain in its meaning, is not to be interpreted by its terms alone, but in view of the circumstances surrounding the whole transaction.

(3.) **The Contract in Judgment Construed.**—That, viewed in the light of these facts, the first contract of shipment was an agreement simply to carry the goods to Louisville, and that for the time being was their destination.

(4.) **Loss of Goods by Robbery.**—That the limitations and restrictions contained in the second contract are to be interpreted as relieving the express company from liability for a loss of the goods by a robbery such as that shown in the proof.

(5.) **Power of Common Carriers to Limit Liability.**—That it was in the power of the company to limit its liability against damages for a loss sustained in this way.

(6.) **Contract with Carriers—Assent of Shipper's Agent.**—That the assent of the agent, Buckles, to the stipulations on the face of the contract is to be presumed from the fact that these terms of the contract were in accordance with the course of business of the company, to which the shipper had assented in previous transactions, and also from the fact of his signing the agreement on the back of the receipt; but it is admitted that the shipper's assent to the terms of such a special contract would not probably be held binding if given under circumstances showing that he was so in the power of the carrier as to leave him no discretion.

(7.) ——. ——. That Buckles had authority as the plaintiff's agent to make any contract according to the usual course of business to procure the goods to be reshipped from Louisville, and that he had authority to release the company from their common-law liability according to the contract of reshipment, and that such a contract made by the clerk of Buckles in the course of business was equally binding upon the plaintiff.

(8.) **Conclusion upon the Facts.**—That the plaintiff could not recover in respect of the goods that were saved, and that the defendant is not liable for the goods that were lost.

McFARLAND, J., delivered the opinion of the court.

The plaintiff brought this action to recover the value of certain goods, which he alleges were delivered to the defendant as a common carrier in the city of New York, to be carried and delivered to him at Nashville, which was never done. He has appealed in error.

There are two counts in the declaration; one averring the delivery of the goods in New York, the other their delivery to the company at Louisville, Ky.; in both counts charging a contract to carry and deliver them to the plaintiff at Nashville.

The plaintiff only offered evidence under the first count. He proved by the testimony of certain witnesses simply that the goods in four boxes were shipped from New York to the plaintiff by the Adams Express Company. The plaintiff offered no receipts or bills of lading in evidence; but the defendant moved the court to compel the plaintiff to deliver up receipts in his possession, and under this order receipts for two of the boxes were delivered up, which were read in evidence by the defendant. They show the boxes were marked "L. Olwell, Nashville, care of J. C. Buckles, Louisville, Ky.," and the receipts contain limitations and restrictions upon the company's common law liability, particularly against loss from causes incident to a time of war.

The proof tends to show that the goods were duly carried to Louisville and were there received by J. C. Buckles, who acted as the agent of the plaintiff. He paid the freight up to that point, and reshipped the goods to the plaintiff at Nashville under a new contract, and took a receipt, on the back of which was an agreement in writing relieving the company from all liability and obligations as forwarders, carriers or bailees. This agreement was signed by C. B. Buckly, "per Memp," who was his clerk. It appears that at the time, which was in February, 1865, during the late war, the express company ran an express line between New York and Louisville. From Louisville to Nashville they had two lines, one by the passenger trains, the other by freight trains known as the army freight lines. Upon these two lines different freights were charged. At this time, by a regulation of the treasury department, goods could not be shipped to civilians living as far south as Nashville without a special permit, and this permit had to be obtained at Louisville from the agent of the department the goods passing through his hands.

Buckles was the agent of the plaintiff for this purpose at Louisville. The plaintiff had previously shipped other goods in this way, and Buckles had made similar contracts for their shipment from Louisville, which do not appear to have been objected to by the plaintiff; on the contrary, his assent appears very manifest.

It is shown in the proof that between Louisville and Nashville the train was attacked by a small band of armed men and captured; a large amount of the goods taken or destroyed, and the remainder torn from the boxes and destroyed. There was a large amount of goods in the train belonging to other parties. The agents of the company on the next day gathered up all that could be found and brought them to Nashville, and after giving notice, no owner could identify them; they were then sold, and the company held the proceeds.

A large mass of testimony was heard upon the question whether the squad that captured the train was composed of Confederate soldiers, and therefore the "public enemy" in the sense of the law. On the part of the plaintiff it was maintained that they were simply robbers. Such is the general outline of the case. The case appears to have received in the court below, as it has here, an elaborate examination by the counsel. The charge of the judge is of great length, upon which very many criticisms have been made; and if each of these questions were taken up and discussed in relation to its various bearings upon the case, it would extend this opinion to an unreasonable length. It is deemed better to dispose of the vital questions as they are raised and presented by the facts of the record, and in this way determine whether any error affecting the merits of the controversy occurred in the court below.

A question very much discussed is whether or not the undertaking of the company in the first instance was to transport the goods from New York to Louisville; and upon this it is earnestly argued that the charge is erroneous. The circuit judge was of opinion that the meaning of these receipts, as to the place to which the goods were to be carried under this contract, was so indefinite that he could not determine the question, and he left it to the jury to determine this in the light of the surrounding circumstances; but the charge indicated that the opinion of the judge was that Louisville and not Nashville was the terminus.

As a general rule it is the province of the judge to construe and ascertain the meaning of a written contract. A receipt or bill of lading of this character has generally been held to be a written contract fixing the duties and liabilities of a carrier. 3 Wall. 107, and authorities. The difficulty as to the meaning of these contracts is in determining to what point the goods are to be carried. The language of these receipts as to this is, "Received of Paten & Co. one case of mdse., ——— value, marked L. Olwell, Nashville, Tennessee, care of J. C. Buckles, Louisville, Ky., which it is mutually agreed is to forwarded to our agency nearest or most convenient to destination," etc. But for the words "care of J. C. Buckles, Louisville, Ky.," we would have no difficulty in understanding that the destination was Nashville, and even with these words, ordinarily the same meaning would be given. If the point to which the goods were to be carried was clearly expressed in the receipt, it probably could not be changed by parol proof. As it is not clearly expressed, we may interpret the meaning in the light of surrounding circumstances. It was contrary to orders and regulations of the treasury department to ship goods from New York to a civilian at Nashville without a special permit. The permit was not obtained at New York in this instance. It was the uniform course of business of the company in such cases not to undertake to carry the goods further than Louisville. At this point, upon permit first being obtained, they would, under a new contract, undertake to carry the goods to their destination. This course of business was well known to the plaintiff. He had

in former cases adopted this course. From Louisville to Nashville the company had two lines at different rates, and the shipper could take his choice.

In the light of these facts we should construe these receipts to be agreements to carry the goods to Louisville, and for the time being that was their destination. The previous course of business between the parties shows that this was their understanding of it. These facts would also fully authorize the jury to find that the two other boxes were carried under a similar contract, although no receipts are shown for these. The plaintiff failed to introduce these two receipts until called for by the defendant. Such transportation being prohibited without a permit, a contract to so transport without the permit would be illegal as against public policy, and the presumption is that such contract was not made.

We think the action of the court in leaving the construction of the receipt to the jury on this question was erroneous; but as we hold that he should have construed the contracts in this respect as he substantially told the jury to construe them, the error does not affect the plaintiff. He should have been more positive than he was.

It would seem that as the plaintiff rested his case upon the proof of a contract to carry the goods from New York to Nashville, which turns out to have been a contract to carry them from New York to Louisville, and that this undertaking was complied with, this might have ended the case.

Other questions, however, have been earnestly argued. The liability of the company under the contract for reshipment from Louisville next arises. As we have seen, the receipt given by the company at Louisville contains upon its face this provision: "It is further agreed, and is part of the consideration of this contract, that the Adams Express Company are not to be held liable or responsible for the property herein mentioned for any loss or damage arising from the damages of railroad, steam or river navigation, leakage, fire, or from the acts of God or of the enemies of the government, mobs, riots, insurrections, pirates, or from any of the damages incident to a time of war, unless specially insured by them and so specified in this receipt, which insurance shall constitute the limit of the liability of the Adams Express Company in any event." The receipt does not show that the property was specially insured.

It is now well settled by authority that common carriers may by special contract limit the measure of their liability. Such is the general current of American authority. See Story on Bailments, § 549; Angell on Com. Carriers, § 239; York Co. v. Central R. R., 3 Wall. 107; 48 N. Y. 498; 16 Wall. 318. The remark in Wormack v. Southern Express Co., 1 Heisk., is not authority against the proposition. The question, then, arises, is the receipt given at Louisville (leaving out of view for the present the agreement on the face of the receipt) a special contract relieving the company from loss occasioned by robbery, of character attributable to this transaction? There can be no question that the language we have quoted above is comprehensive enough to bear this meaning. None other can be given to it.

Was this assented to by both parties as the contract? It is settled that a general notice to shippers that the carrier will not be liable for certain dangers or losses, will not release the carrier. There must be a special contract. There are authorities holding that receipts thrust upon shippers in the hurry of business, containing printed conditions and restrictions upon the carrier's liability, under circumstances indicating that the shipper's attention was not called to these terms or his assent given, are not special contracts. See Southern Express v. Moore, 39 Miss.; Lumbager v. Westcott, 49 Barbour; Blossom v. Dodd, 3 Am. Rep. 701. And in a recent case before the Supreme Court of the United States it was held that a printed notice on the back of the receipt was not, upon the facts of the case, a part of the contract, although it was referred to in the face of the receipt. The court held that it not being expressly assented to, had no other effect than a general notice to shippers. The case, however, fully recognizes the doctrine that the carrier's liability may be limited by special contract. It has not been regarded as essential that the contract shall be executed or signed by the shipper as well as the carrier; it is sufficient if he assents to it. In the case of York Co. v. Central R. R. Co., 3 Wall. 107, it was held that a bill of lading by which the carriers agreed to deliver the property, "fire and the unavoidable dangers of the river only excepted," was a special contract, under which the carrier was not liable for loss accruing from fire, although the shipper proved that his attention was not called to the fire clause, and that the goods were shipped before the bills of lading were signed. The distinction between a stipulation made in the body of the receipt and one made upon the back of the receipt is not clear; but the latter is treated as a mere notice, which by the authorities is not sufficient to release the carrier unless it be expressly assented to as part of the contract. Ordinarily we would suppose that if there be nothing to raise a contrary presumption, the natural presumption would be that the shipper was apprised of the contents of the receipt and assents to its terms. This, we think, would certainly be so where the terms of the contract were in accordance with the course of business of the company, to which the shipper had assented in previous transactions. Such was the present case, as we think; and in this view the stipulations on the face of the receipt, if assented to, would be effectual to release the carrier, without regard to the agreement signed on the back of the receipt; but the signing of this endorsement would be evidence of assent to the terms of contract expressed in the face of the receipt as well as the back of the receipt, provided that Buckly, the agent, had authority to make the contract. As to how far a carrier may be released from his common-law liability, we think if he may stipulate not to be chargeable for loss by fire, as in the case in 3 Wallace, he may also stipulate not to be liable for loss by robbery. We do not hold, however, that the carrier could in any event be relieved from the consequences of fraud or the want of due diligence and good faith. We add, also, that the shipper's assent to the special contract would probably not be held binding if given under circumstances showing that he was so in the power of the carrier as to leave him no discretion.

But it is argued that Buckles had no authority to make a contract for shipment by which the company were released. Upon the assumption that the first contract was to carry from New York and deliver to Buckles, then Buckles having possession of the goods, for shipment, had authority to make any contract according to the usual course of business to procure these shipments; and we may add, a contract made by his clerk in the course of business would be equally binding. See Nelson v. Hudson River R. R., 48 New York, 498. And, again, if it be conceded that the first contract was to carry to Nashville, still this might be changed by the contract at Louisville, and the record contains ample evidence showing the plaintiff's authority to bind him by contracts of this character. His correspondence shows that the terms upon which the company made shipments were well known to him.

But it is again argued that the contract by Buckly at Louisville releasing the company from liability was without consideration. The authorities upon this question seem to be that if the company carry goods at one rate, holding themselves to the ordinary liability of carriers, then in a contract to carry at the *same rate*, the company being released from liability, the release is without consideration. To make the release binding it should be upon the condition of a lower rate, or something equivalent. See 48 New York, 512. It appears in this case that the rates were different; that the company charged higher rates when the goods were insured. The court correctly charged the jury that notwithstanding the contract, the company would not be released from the consequences of the fraud, or want of diligence or good faith, of its agents. And we think his charge in regard to the degree of dili-

gence required of the company's agents is not subject to objection, and that the proof shows no fault upon the part of the company's agents.

We do not see any grounds on which the plaintiff could recover in respect to the goods that were saved. *Prima facie* the loss of the plaintiff's goods is fully shown by the proof. The goods recovered were in a loose condition, and the company could not be supposed to know that they belonged to plaintiff, especially as the plaintiff would not undertake himself to say that they did.

There are, perhaps, abstract errors in the charge, but upon a careful consideration of the case we think they do not affect the merits. It is a case where by the contract, as we construe it, the company would not be liable for any losses accruing from causes incident to a time of war, without regard to whether the parties destroying the goods were the "public enemy" or not. And we think there was nothing to show fraud or bad faith upon the part of its agents.

Upon the whole case we affirm the judgment.

The Shipping Act of 1872—Construction by District Judge Lowell—When Contracts with Seamen must be in Writing.

THE GRACE LATHROP.

Circuit Court of the United States, District of Massachusetts, 1874.

Before Hon. JOHN LOWELL, District Judge.

1. **Shipping Act of 1872—Construction of § 13.**—Section 13 of the act of June 7, 1872, 17 Stats. 262, requiring agreements of seamen to be signed in the presence of a shipping commissioner, refers only to the agreements mentioned in section 12 of that act.
2. ——. **Construction of Clause 2 of § 14.**—The second clause of section 14, which punishes taking on board of a merchant ship any seaman who has been engaged or supplied contrary to the provisions of the act, does not refer to seamen who have agreed to make a voyage not mentioned in section 12, and have not signed the agreement in presence of a shipping commissioner.
3. ——. **Construction of § 8.**—Section 8 of the statute authorizes the master, owner or consignee of a ship about to make a voyage not mentioned in section 12 to be his own shipping commissioner; and this section is not controlled by anything in sections 13 and 14.

E. L. Barney, assistant district attorney, for the United States; *S. J. Thomas*, for the ship.

LOWELL, J.—This libel is brought by the district attorney in behalf of the United States, to enforce a penalty not exceeding one thousand dollars for five seamen alleged to have been engaged or supplied contrary to the provisions of the act for the appointment of shipping commissioners, approved June 7, 1872, 17 Stats. 262, and to have been knowingly received on board the Grace Lathrop, by the master of said vessel, at Boston, on the eighteenth day of December last. The particular charge is that the agreement with the men was not signed in the presence of a shipping commissioner, although there was such an officer at Boston, duly qualified and ready to act. The voyage was from Boston to one or more ports in the West Indies and back to Boston.

The answer admits the shipment of the men, but denies that the voyage was one within that part of the statute requiring agreements to be signed before a shipping commissioner.

The first section of the shipping act which mentions agreements is section 12, which prescribes a particular form of agreement to be entered into by the master with his crew before he proceeds on any foreign voyage, or on one from the Atlantic to the Pacific coast, or *vice versa*. This section was amended in January, 1873, 17 Stats. 410, so as to remove from its scope voyages to the West India Islands or to Mexico. Section 13 of the principal act then goes on to require that all agreements shall be signed in the presence of a shipping commissioner. Section 14 makes the ship liable to penalties; first, if any person shall be carried to sea as one of the crew on board of any ship making a voyage as before specified, "without entering into an agreement with the master in the form and manner and the place and time hereby in such cases required;" and secondly, if any master, mate or other officer of any ship knowingly receive to be entered on board of any merchant ship any seaman, who has been engaged or supplied contrary to the provisions of the act.

The argument of the United States is: That the language of section 13 is very broad, and is intended to include not only the agreements mentioned in the act itself, but all those which may be made under the act of 1790, which takes in all voyages of any importance excepting in the fisheries; that the first penal clause of section 14 punishes a non-compliance with the act of 1872, by carrying seamen to sea who have not signed an agreement in all respects as required by section 12; and the second penal clause punishing the taking on board seamen illegally engaged or supplied must refer to something, and why not, then, to seamen who come within the act of 1790, and have signed an agreement as required by that act, but not before a shipping commissioner? I shall presently show that neither of these sections has the meaning contended for, but my decision of the case is based largely upon section 8, which provides, in so many words, that nothing in the act contained shall be construed to prevent the owner, master, or consignee of any ship, except as described in section 12, from performing himself, so far as such ship is concerned, the duties of shipping commissioner under this act. This is a controlling section which governs sections 13 and 14 and all others, and explicitly declares that nothing contained in them, or any of them, shall be construed to prevent the master, in such a case as this, from shipping his own crew. Granting, therefore, that the construction of sections 13 and 14 contended for by the prosecution is sound, then all agreements not mentioned in section 12, must be signed in the presence either of the official commissioner or of the master, owner or consignee, and the libel in this case does not allege anything except the absence of the duly qualified official. It does not say that the master, owner or consignee did not act as shipping commissioner, and act fully and with all due form in that capacity. This was the point ruled on in argument before me.

Recurring now to section 13. It is as follows: "The following rules shall be observed respecting agreements: first, every agreement (excepting such cases of agreements as are hereinafter specially provided for) shall be signed by each seaman in the presence of a shipping commissioner;" secondly, they are to be signed in duplicate, one part of which shall be retained by the shipping commissioner, and the other shall contain a special form or place for the description and signatures of persons engaged subsequently to the first departure of the ship; thirdly, there is to be an acknowledgment and certificate, under the hand and official seal of the commissioner, endorsed on the agreement, testifying to all the acknowledgments, and to the intelligent and sober appreciation by the men of the contract they have signed.

Now, it is tolerably clear, I think, that all this apparatus was not intended to be brought into operation, four times a week, for voyages between this port and New York. This I say merely by way of illustration. It must apply to all coasting voyages, if it applies to any voyages not mentioned in section 12. I am not sure that I can express my opinion as clearly as I hold it, but it does seem to me that sections 12 and 13 are one enactment, concerning one and the same subject matter, and no other; that the former requires agreements to be made in certain cases, and the latter provides how they shall be signed and acknowledged. Any search for a further meaning is an unauthorized exercise of ingenuity.

It is said the expression "every agreement" is broad enough to cover all those required in coasting voyages by the act of 1790. This is true. But it is much broader than that. It will cover every agreement made by a seaman for any voyage, or indeed for anything else; there is nothing in section 13 itself to limit it to any subject matter. It is simply that every agreement shall

be signed by the seamen in the presence of the shipping commissioner. It is confined to seamen signing agreements, and that is all. Of course it must be limited, and by the context, and the only context is section 12.

The well-known statute of July 20, 1790, § 1, 1 Stats. 131, requires the master of every ship or vessel bound on any sort of a voyage, coasting or other, with very trifling exceptions, before he proceeds on the voyage, to make an agreement in writing or print with every seaman, under a penalty of twenty dollars. This has been held not to include whaling and fishing voyages. The argument of the United States, as I have said, imports this statute into section 13 of the act of 1872, by the words "agreements and every agreement."

Another objection to this construction is that under it, if a master about to proceed on a coasting, Mexican, or West Indian voyage (which is admitted to come under the act of 1790, and not under section 12 of the act of 1872), makes no written agreement with any of his crew, he is liable to a penalty of twenty dollars for each seaman carried to sea; while if he makes one in strict and careful conformity with that statute, but not in presence of a shipping commissioner, the penalty is two hundred dollars for each seaman. For it has not been contended and can not be successfully maintained that the act of 1872 punishes the neglect to make any written agreement at all, except as required by section 12. Nay, more, the act of June 19, 1813, 3 Stats. 2, requires a written agreement for the cod fishery, and imposes no penalty for a breach; whaling voyages, and those for mackerel, are always made under written agreements, though no statute requires it. All these agreements are within section 13, if those under the statute of 1790 are included; for an agreement is an agreement. If this be the true construction of the act, it holds out a strong inducement against making written contracts in any of those cases, because the whole real and actual contest is a question of the fees of the shipping commissioner, and the trouble and formality attending the shipments before him.

It is said that it would operate beneficially if all agreements were signed before a commissioner. This may be so. As regards foreign voyages I agree to it most heartily. But the protection which the commissioner would afford is of comparatively little importance in the coasting trade, in which the crew have frequent opportunities to obtain a redress of any wrongs they may suffer, because they are never many days' sail from a home port, and in which they seldom suffer any wrongs. It is a fact well known to all judges in commercial ports, that there is very little complaint or litigation between officers and men, growing out of the voyages not mentioned in section 12. Scarcely a term passes that I do not try several indictments for offences said to have been committed on foreign voyages, and I can recall but one criminal case that I ever tried in which the complaint related to a coasting voyage. I doubt whether the supposed advantages of applying the section to coasting voyages would make up for the expense incurred by such a practice. The same sort of protection which would be afforded by shipping seamen for the coasting trade in presence of a commissioner, would be derived by discharging them before that officer; but the necessity for this is expressly negatived by section 22. I shall speak in a moment of the suggestion that there is no such express exception in section 13.

To me it is plain that Congress, as shown by sections 8, 12, 22, and many others, did not intend to hamper our enormous coastwise trade, with its constantly-recurring voyages, by the burden of paying the fees of shipping commissioners. And some one has prevailed on the legislature to class West Indian and Mexican voyages with the coasting trade in this respect.

It is said that if it was intended to limit the broad and general language of section 13, it would have been easy to say so in the section. It appears to me that the limitation is plain enough; but if not, the remark is quite as pertinent, and more so, that if Congress intended to include in section 13 agreements which are not mentioned in the act, it was not only easy but highly necessary to point them out.

I do not mean to be understood that section 13 is free of difficulty. The main question of its construction is now pending before the supreme court on a certificate of division of opinion from this circuit and district; and with whatever decision is made I shall not only be bound to be, but shall be entirely content.

The next point is whether the second clause of section 14 punishes the taking on board ship a seaman who has signed such an agreement as is required by the act of 1790, but has not signed it before a shipping commissioner. We here concede, of course, for the purposes of the argument, that section 13 requires such signing. I consider it tolerably certain that section 14 has no such intent. The offence is receiving on board seamen who have been engaged or supplied contrary to the provisions of the act. Now there is nothing in the act which regulates the engaging or supplying of seamen before they are taken on board ship. The acts of 1790 and 1872 require certain agreements to be made *before the voyage is begun;* but it is entirely consistent with those laws, and is the practice in some trades, to make the written agreements on board the ship after the seamen have been orally engaged. How, then, can this offence be committed? I do not know. But I do see that there is nothing in the act of 1872 contrary to which seamen can be received on board a merchant ship.

This penal clause, excepting in the amount of the penalty and the person who is to pay it, is taken literally from the merchant shipping act of Great Britain of 1854, section 147, in which it has a totally different sense from that now proposed for it. That statute provides not only for shipping commissioners (called shipping masters in that act) before whom agreements are to be signed and men discharged, etc., but also that a certain number of persons may be licensed in a certain way to procure and supply seamen for merchant ships, that is to say, to make the original and general oral engagement with them; and there is a penalty on any unlicensed person who shall procure or supply seamen, and on the master who receives on board persons unlawfully engaged or supplied, which is the clause now under review. The meaning in that act is plain and intelligible, and has nothing to do with the written agreements one way or another.

Now, I admit that our statute does not provide for any such licenses, and therefore can not have the meaning given to it in England, and I admit we must try to give a meaning to every part of every act of Congress; but I can not admit that I ought to exercise a great deal of ingenuity to find a secondary or conjectural sense for a set of words which have been taken bodily from a place where their intent is obvious, and put into one where there is no apparent meaning for them; because I know, in point of fact, that the act must have been adopted for what it might turn out to be worth in its new quarters. I agree, further, that the word "engagement" might include a written agreement, but when the defined offence is the receiving on board a ship seamen not duly engaged or supplied, and there is no law regulating their supply, and no law which requires the written engagement—if we choose to call it so—to be made *before they are received on board*, and when the natural and obvious and historical meaning of the word does not refer to any written agreement, and if it be construed to mean a written agreement, the offence must depend on whether the master chooses to make the written agreement on shore or on board. I conclude that "seamen engaged or supplied" does not mean seamen who happen to have signed one sort of contract or another before the time when there is any necessity for them to sign anything.

I have seen copies of the judgments of the district and circuit courts for the eastern district of New York, in the case of The City of Mexico, which sustain the position of the prosecution. It is hardly necessary for me to say that these judgments have received my most careful and respectful consideration; and were it not for those decisions I should not consider this case a very doubtful

one. I venture to remark, however, that, as far as may be gathered from the opinions of the judges, the case was very imperfectly presented by the defence; and what argument there was took up the wholly untenable ground that the act of 1790, so far as Mexican voyages are concerned, had been repealed, and a great part of the opinions is occupied in an able and convincing refutation of this argument. No allusion is made to section 8, nor to any of the arguments which seem to me to have force in construing sections 13 and 14. It is impossible for me, therefore, to ascertain whether these arguments might not have had some weight, and even a controlling weight, in the case if they had been presented or suggested.

Sitting here under a responsibility which I cannot transfer, except when a decision has been made which is of binding authority upon this court, my best judgment is:

1. It is doubtful whether section 13 refers to any agreements not mentioned in section 12. In my opinion it does not.

2. It is doubtful whether section 14, second penal clause, has any reference to the signing of written agreements. In my opinion it has not.

3. Section 8 expressly declares that on a voyage of the kind now in judgment the master may be his own shipping commissioner, and the libel does not negative the master of the Grace Lathrop's acting as such commissioner on this occasion.

LIBEL DISMISSED.

The Shipping Act of 1872—Construction by Circuit Judge Woodruff—When Contracts with Seamen must be in Writing.

THE UNITED STATES OF AMERICA v. THE STEAMSHIP CITY OF MEXICO.

Circuit Court of the United States, Eastern District of New York, February 21, 1874.

Before Hon. LEWIS B. WOODRUFF, Circuit Judge.

1. **Shipping Act of 1872—Contracts with Seamen.**—The shipping act of 1872 expounded, and it is held that under this act the masters of all ships which are described in the navigation act of 1790 must, on shipping seamen for a voyage, make with them an agreement in writing or in print. Some of these agreements may still be made in the form prescribed by the act of 1790, while others must be made in the more detailed form prescribed by the 12th section of the shipping law of 1872; but no ship is permitted to go to sea without a written or printed agreement with the seamen.

3. ——. ——. **Amendatory Act of 1873.**—The amendatory shipping act of January 15, 1873 which exempts voyages to the British North American Possessions, Mexico and the West Indies from the operation of the 12th section of the act of 1872, does not do away with the necessity of entering into written contracts with seamen shipped for such voyages.

——. ——. **Case in Judgment.**—The steamship City of Mexico performed a voyage "from New York to Vera Cruz and one or more ports in Mexico, back to New York, with privilege of trading at intermediate ports." Seamen were shipped for this voyage without signing their names as required by the 13th section of the shipping act of 1872. *Held*, that the ship incurred the penalty declared in the second clause of the 14th section of the act of 1872, and decree was entered accordingly.

WOODRUFF, J.—The libel in this case is founded on the provisions of the fourteenth section of the act of congress entitled "An act to authorize the appointment of shipping commissioners by the several circuit courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen." (17 U. S. Statutes at Large, 262-265.)

That section imposes a penalty upon any ship, not exceeding two hundred dollars, for each offence therein specified, and it separately specifies offences which shall subject the ship to penalty, by two distinct clauses. First, if any person shall be carried to sea as one of the crew on board of any ship making a voyage as hereinbefore specified, without entering into an agreement with the master of said ship, in the form and manner and at the place and times hereby in such cases required, the ship shall be held liable, and for every such offence shall incur a penalty not exceeding $200. Provided always that the ship shall not be held liable for any person carried to sea," &c., &c. [describing certain cases of secretion on board without the knowledge of any officer of the ship, or false personation, &c.]

"Secondly, if any master, mate or other officer of a ship knowingly receives or accepts to be entered on board of any merchant ship any seaman who has been engaged or supplied contrary to the provisions of this act, the ship on board of which such seaman shall be found shall, for every such seaman, be liable to and incur the penalty of a sum not exceeding two hundred dollars: Provided further, that in case of desertion or of casualty resulting in the loss of one or more seamen, the master may ship * * * and report the same to the United States consul at the first port at which he shall arrive, without incurring such penalty."

Here are described two separate penalties in distinct clauses of the section, and, as will presently be seen, the enquiry why both were inserted is very important and significant, for the cases mentioned therein do not on their face seem to differ. Looking at the description of the cases, without consulting any other provisions of this or other statutes or requirements of law, it may well be suggested that no person can be carried to sea as one of the crew, with the knowledge of the officers of the ship, without being received, accepted or entered on board, and hence the two clauses would seem to be tautological or repetitions, prescribing two penalties for the same violations of law, one for each offence not exceeding two hundred dollars, and the other for every such seaman, not exceeding two hundred dollars. But this declaration in these separate clauses will, I think, be found a significant and important aid to the construction of the statute when the facts of this case, the other provisions of this statute and the former law and the claims here made by the counsel for the parties are more fully brought into view.

From as early as the year 1729 the statutes of England for the protection of seamen, as well as the security of ship-owners, have required under penalty that no master bound to parts beyond seas shall carry any seaman or mariner to sea without first coming to an agreement with such seaman or mariner for their wages, time of service and other particulars specified, which agreement shall be in writing, &c. (act of 2d Geo. II, chap. 36, § 1), and providing expressly that the seaman shall sign such agreement (ib., sec. 2). By subsequent statutes having the interest and protection of seamen constantly in view, the provisions of the act referred to have been enlarged and carried into greater detail, and down to the present time the policy and even the necessity of such agreements has been recognized and this requirement kept in full force.

This subject very early engaged the attention of the Congress of the United States, and by act of July 20, 1790 (1 U. S. Statutes at Large, p. 131), it was enacted that from and after the first day of December then next, "Every master or commander of any ship or vessel bound from a port of the United States to a foreign port, or of any ship or vessel of the burthen of fifty tons or upward, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement in writing or in print with every seaman or mariner on board such ship or vessel (except such as shall be apprentice or servant to himself or owners), declaring the voyage, term or terms of time for which such seaman or mariner shall be shipped. And if any master or commander of such ship or vessel shall carry out any seaman or mariner (except apprentices or servants as aforesaid) without such contract or agreement being first made and signed by the seamen or mariners, such master or commander shall pay to every such seaman or mariner the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage within three months next before the time of such shipping; provided such seaman or mariner shall perform such voyage, or if not, then for such time as he shall continue to do duty on board

such ship or vessel; and shall moreover forfeit twenty dollars for every such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States; and such seaman or mariner not having signed such contract shall not be bound by the regulations nor subject to the penalties and forfeitures contained in this act." Other provisions follow, designed to secure both the seaman and the master or owners to the performance of their reciprocal duties. The act of April 14, 1792 (1 Statutes at Large, 254, chap. 24), among other things provides for the return of seamen, bound by agreement to serve, to their homes, in certain cases, through the consuls of the United States. Other and subsequent acts exhibit the desire of congress to watch over and protect the interests of seamen.

In 1872 the act under which this proceeding was instituted was passed. It provides for the appointment of a shipping commissioner, and makes numerous and extensive provisions for carrying out the intention expressed in its title above recited. Section 12 relates to ships bound from a port in the United States to a foreign port, or from a port on the Atlantic to a port on the Pacific, or *vice versa*, and provides that the master of every such ship "shall, before he proceeds on such voyage, make an agreement in writing or in print with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be in the form as near as may be, as hereunto in table 'D' in the schedule annexed, and shall be dated at the time of the first signature thereto, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars, that is to say." Here follow numerous particulars, including all that were contained in the act of 1790, and very many which were not required by the law of 1790, or otherwise, in respect to other vessels than those in this section specified and the form of agreement annexed. Table "D" contains many other specific details. Provisos to the section authorize the master to perform the duties of a shipping commissioner, as provided in a previous section, when in a port for which no shipping commissioner has been appointed; and further, that this section should not apply to masters of vessels where the seamen are by custom or agreement entitled to participate in the profits or results of a cruise or voyage; nor to masters of coastwise; nor to take-going vessels that touched at foreign ports. It will there be seen that the duty of the master to enter into written or printed agreement with seamen is continued, and that, as to ships bound on certain specific voyages, the agreement must contain the details specifically mentioned in this section, while the masters of other vessels not included in this section satisfied their duty by making an agreement in writing signed by the seamen, containing what was prescribed in the former law. The masters of all ships described in the act of 1790 must make the agreement with the seamen in writing or in print—some in the form prescribed by that act, and others in the much more detailed form prescribed in this twelfth section, but none were permitted to go to sea without a written or printed agreement with the seamen.

Hereupon follows section 13, which declares that the following rules shall be observed with respect to agreements:

First—Every agreement (except in such cases of agreements as are hereinafter specially provided for) shall be signed by each seaman in the presence of a shipping commissioner.

Second—When the crew are first engaged the agreement shall be signed in duplicate, and one part shall be retained by the shipping commissioner, and the other part shall contain a special place or form for the description and signatures of persons engaged subsequently to the first departure of the ship, and shall be delivered to the master.

Third—Every agreement entered into before the commissioner shall be acknowledged and certified under the hand and official seal of such commissioner, and shall be endorsed on or annexed to such "agreement" * * * [and the form of acknowledgment and certificate is given.] It is claimed that the words "every agreement" in the first clause of this thirteenth section mean only those agreements which masters of certain specified vessels named in the twelfth section are by that section required to make. But that is not the literal reading of the section. If that had been its intent, nothing was easier than to have so expressed it. Throughout the act, wherever it was intended to limit a provision to the voyages described in the twelfth section, the limitation is made in express terms. (*Vide* §§ 8, 22, 24, 35, 36, 40, 58, and others which are connected therewith in these provisions.) Nor is there anything in the design and object of the law which implies such a limitation. If there were no other provisions in the various sections of the statute except such as relate to the particular vessels included in the twelfth section, much plausibility would be given to the claim; but many of the sections—probably the greatest number of them—are general, referring alike to other seamen as well as to those named in the twelfth section. (§§ 9, 11, 23, 25, 26, 31, 32, 43 to 50, 51 to 54, 61 to 63 and others.) Section 15 is especially significant, and the special exceptions in section 13, of agreements hereinafter specially provided for, greatly strengthen this interpretation; for, when after the use of the terms "every agreement," congress declared certain agreements to be excepted, the presumption is against any other exceptions. Nor does the nature of the provisions in the 13th section indicate such an intent. The purpose of the act is fittingly declared in its title to be for the protection of seamen. They need protection against being compelled or reduced to sign agreements to serve without properly understanding the provisions of the agreement, the term of service, the nature of the voyage or voyages, the compensation they are to receive, and the time of payment. They are frequently in danger of being approached and led into engagements when intoxicated. All this congress knew, and wisely provided that every agreement should be signed by them in the presence of the commissioner and be duly acknowledged. Certainly this court can not say that this was not as important in reference to the agreements which are required by the act of 1790, as to those specified in the twelfth section. The two clauses of the fourteenth section above recited apply to this construction of the thirteenth section with especial significance. The first clause refers to the crew of a ship "making a voyage as hereinbefore specified," *i. e.* making the voyages mentioned in the twelfth section, and annexes the penalty to taking to sea without an agreement "in the form," &c., hereby "in such cases" required. The form hereby required is prescribed in the twelfth section, and is required only in the cases therein specified. The vessel here was not condemned under that clause. But the second part of the section is more general. It refers in terms to the officers of "any merchant ship," and to "any seaman" who has been engaged or supplied contrary to the provisions of this act. There are several provisions relating to that subject, and probably none more important than the thirteenth section, which provides for their signing agreements to serve for a voyage, in the presence of a commissioner, and so guards them from imposition and deception therein, as the case may be, when they are in a condition wholly unfit to take care of themselves. Sailors are so often likened to children in reference to the ease with which they may be deceived or influenced, and their recklessness or inability to protect themselves, that the value of these provisions needs no further illustration.

Unless this second clause is to have such general scope and effect, extending beyond the twelfth section and to cases not within it, it is difficult to assign to it any useful meaning. The cases arising under the twelfth section are provided for in the first clause. These circumstances lead to the conclusion that not only the agreements mentioned in the twelfth section, but all other agreements with seamen required by law to be in writing (though not included in the twelfth section), must be signed by the seamen in the presence of the commissioners, or the penalty declared in

the second clause of the fourteenth section is incurred by the ship.

To apply this conclusion to the case now under consideration:

By an act of congress passed on the 15th of January, 1873 (17 Statutes at Large, 410), the act to authorize the appointment of shipping commissioners, now under consideration, was amended by adding to the above mentioned twelfth section a further proviso, namely: "Provided, further, that this section shall not apply to masters of vessels when engaged in trade between the United States and the British North American possessions, or the West India Islands, or the Republic of Mexico." By this proviso the number or class of vessels whose master is required to make with seamen the written or printed agreement specified in that section, is greatly reduced. The voyage of the steamship City of Mexico, for which seamen were shipped without their signing the same, as required in the thirteenth section of the said act, was so proved on the trial of this cause, "from the port of New York via Vera Cruz, and one or more ports in Mexico, and back to New York, with privilege of trading at any intermediate ports." This was a case within the proviso, introduced by the amendment of 1873, so that section twelve of the act has no application thereto. "So far as this voyage is concerned, the act and the amendment are to be read together, and the master of the City of Mexico was under no duty to make with his seamen an agreement in the form and with the numerous details of its contents and time of signing by the master, which the twelfth section prescribes. But applying to the case the conclusion herein above stated, the master was within the section which requires that every agreement shall be signed by the seamen in the presence of the shipping commissioners, unless it can be shown that he was under no legal obligation to make any written or printed agreement whatever with his seamen. That proposition can not be maintained.

Upon that point I concur fully in the reasoning of the judge of the district court, the effect of the amendment was to withdraw the voyage of the City of Mexico from the operation of the twelfth section, and to leave it in the same condition and subject it to all the duties and obligations to which it would have been subject if the twelfth section of the act had been originally passed in its now amended form. An actual intention of the minds of the legislators to withdraw a very large proportion of our seamen from the protection of written shipping articles, which it has been the intention and policy of England for more than one hundred and fifty years to provide, and which this country adopted in its earliest history, and has since consistently maintained, and will not, I think, be for a moment contended. The argument is that whatever we may suppose to have been in the minds of our legislators, we are bound by what is involved in the word and legal effect of their enactment, and thereupon it is claimed that when the terms of the twelfth section of the act of 1872 were, as originally passed, made broad enough to embrace the voyage in question, that operated by implication as a repeal of the act of 1790, so far as relates to such voyages, and hence, when in 1873, congress withdrew such voyages from the operation of the twelfth section, that act necessarily left such voyages wholly unprovided for by any existing law; that although it is possible to say that this legislation created a *casus omissus*, which the legislators did not, probably, in their minds contemplate, the court is nevertheless bound to construe statutes according to the meaning and legal effect disclosed by the statutes themselves, andnot by any speculative enquiry into the actual intention of the legislators. This may be conceded, but if it is claimed that the legislative intent may not be gathered from the nature of the subject, the consequences which would flow from a proposed construction and the admitted policy of the government, the claim goes too far. Whenever the construction of statutes and their legal effect is doubtful or susceptible of a double interpretation, these considerations are of great force and often conclusive.

The act of 1790 (with some few exceptions) applied to the masters of all vesseis. Section 12 of the act of 1872 selected some of those vessels and applied to them its more stringent and particular provisions. From these latter provisions the voyage now in question was relieved. Now I do not deem it very material to say whether the voyages to the West Indies were always under the operation of both statutes, and so when relieved from the operation of the twelfth section, were simply left under the influence of the statute of 1790, or whether the twelfth section operated as a technical or constructive repeal of the act of 1790 in respect to such voyages, but that the amendments operated to revive the act of 1790, thus constructively repealed. Either view works the same result. Repeals by construction are not favored. There was no repugnance or inconsistency between the requirements of the act of 1790 and the requirements of the twelfth section of the act of 1873.

To the requirements of the act of 1790 that twelfth section refers in special cases. When the voyage now in question was withdrawn from among those cases, it remained under the operation of the act of 1790 as fully as if the act of 1873 had not been passed.

It follows that the City of Mexico incurred the penalty declared in the second clause of the fourteenth section of the act of 1872, for which the decree was pronounced in the district court, and it must be so here decreed with costs.

DECREE FOR LIBELLANT.

Liens of Mechanics, Laborers and Material-Men Under the Indiana Statute—Enforcement of the Lien where a Material-Man Furnishes Materials to a Sub-Contractor.

RICHARD S. COULTER v. CHARLES FRESE, CHARLES F. HAHN, JOHN A. LYONS, AND INDIANAPOLIS MANUFACTURERS AND CARPENTERS' UNION.

Supreme Court of Judicature of Indiana, No. 3508, *April* 11, 1874.

JOHN PETTIT, LL D.,
ANDREW L. OSBORNE, LL. D.,
ALEXANDER C. DOWNEY, LL D.,
JAMES L. WORDEN, LL. D.,
SAMUEL H. BUSHKIRK, LL. D., } Judges.

1. **Furnisher's Lien for Materials Furnished to Sub-Contractor.**—To give a person furnishing materials for a new building a right to acquire a lien on the building and real estate, to the extent of the value of the materials furnished, it is not necessary that the materials should be furnished to the owner of the real estate who is erecting the building, or to his immediate contractor; but section 647 of the code, as qualified by section 648, gives such right to any person furnishing materials for a new building to a sub-contractor.

2. ——. **Payment by Owner to Contractor before Notice of Lien.**—A lien thus acquired is not defeated by payment in full by the owner to the contractor of the entire amount due him, before notice of the intention to hold the lien has been filed, it being filed within the time limited therefor.

3. **The Indiana Statute** relating to the liens of mechanics, laborers and material-men expounded at length, and the construction put upon it in Barker v. Buell, 35 Ind. 297, re-affirmed.

4. ——. **Constitutional Law.**—Said statute is not unconstitutional for the reason that the subject matter is not expressed in the title.

From the Marion Superior Court.

WORDEN, J.—This was an action by Charles Frese and Charles F. Hahn against Richard S. Coulter, to enforce a supposed lien which the plaintiffs had acquired upon certain real estate described in the complaint, owned by Coulter, for material furnished by the plaintiffs to Green and Taylor, who were contractors with Coulter for the erection of a house upon the premises described. John A. Lyons and the Indianapolis Manufacturers and Carpenters' Union were made parties defendant, and they each filed a cross-complaint against Coulter to enforce a like lien. Coulter filed separate answers to the original and cross-complaints. The third p-

agraph of each of these answers alleged, in substance, that he, Coulter, was the owner of the premises; that he made a contract with Green & Taylor, and no one else, for the furnishing of the materials and the erection of the house; that in pursuance of the contract Green & Taylor furnished the material and erected the house, and that before notices of intention to hold said lien were filed in the recorder's office he fully paid and satisfied Green & Taylor for the work done and materials furnished. Demurrers were filed respectively to each of these paragraphs of answer, for want of sufficient facts, but were overruled and exception taken. Issues of fact were formed and the cause submitted to the court for trial.

The court made a special finding which it is not necessary to set out in full. The finding embraces all the facts necessary to the establishment of the lien of the original plaintiffs, as well as of Lyons and the other cross-complainant, if as material-men furnishing materials to the contractor of Coulter, they are entitled to such lien, and unless they are precluded by the fact that before notice of the intent to hold the liens were filed in the proper office, Coulter settled with and paid off his contractors in full.

The court held as a conclusion of law from the facts found, that neither the original plaintiffs nor the cross-complainants were entitled to maintain their supposed lien, and rendered judgment against all of them in favor of Coulter. Due exceptions were taken to the conclusion of law. On appeal to the general term the judgment rendered at special term was reversed, the court holding that error was committed in overruling the demurrers to the paragraphs of answer mentioned, and in the conclusion of law. From the judgment of reversal thus rendered at general term, an appeal has been taken to this court, and the same questions are presented here as were presented to the court below at general term.

The two questions thus presented have been elaborately argued by counsel. They may be stated as follows: First, can a material-man who furnishes materials, not to the owners but to the contractor, for the erection of a new building, acquire and enforce a lien on the building and on the interest of the owner of the lot on which it stands, to the extent of the value of the material furnished? Second, if such lien can be acquired, is it defeated by the fact that the owner, before the filing of the notice of intention to hold the lien, it being filed within the time limited, has paid off the contractors in full for the work and materials?

That such lien can be acquired was decided by this court in the case of Barker v. Buell, 35 Ind. 297. We have been earnestly pressed to reconsider the decision in that case. We have done so, but have again reached the same conclusion. In that case the original and amended sections of the entire statute relating to mechanics' liens were brought together and set out. At the risk of some prolixity we again transcribe two of the sections, being those on which the questions here involved mainly depend.

"Sec. 647. Mechanics and all persons performing labor or furnishing material for the construction or repair of any building, or who may have furnished any engine or other machinery for any mill, distillery or other manufactory, may have a lien separately or jointly upon the building which they may have constructed or repaired, or upon any building, mill, distillery, or other manufactory for which they may have furnished materials of and description, and on the interest of the owner of the lot or land on which it stands, to the extent of the value of any labor done or materials furnished, or for both.

"Sec. 648. The provisions of this act shall only extend to work done or materials furnished on new buildings, or to a contract entered into with the owner of any building for repairs, or to the engine or other machinery furnished for any mill, distillery, or other manufactory, unless furnished to the owner of the land on which the same may be situate, and not to any contract made with the tenant, except only to the extent of his interest."

Sec. 649 provides for a personal liability of the owner of a building in favor of any sub-contractor, journeyman or laborer employed in the construction or repair, or furnishing materials for any buildings, not to exceed, however, the amount due, or that may become due, from the owner to the employer. This section is confined to the subject of personal liability, and has no relation whatever to liens on property. The other sections of the article provide for the manner of acquiring and enforcing the liens.

If the original plaintiffs and the cross-complainants are not entitled respectively to their liens, it must be in consequence of the circumstance that the materials were furnished by them to Green & Taylor, the contractors of Coulter, and not to Coulter himself. But upon reviewing the statute and again considering its terms, we find ourselves utterly unable to give it a construction that will limit the material-man. It must be so as to mechanics and all persons performing labor, right of lien to cases where the materials are furnished to the owner. If such is the case as to material-men, for they all stand upon the same ground, so far as this provision of the statute is concerned. Section 647 provides that mechanics and all persons performing labor or furnishing materials for the construction or repair of any building, shall have a lien, without any limitation in respect to the person to whom the materials are furnished or for whom the labor may be performed. But the meaning of this section is placed beyond doubt by the next. We quote the following paragraph from the opinion of this court in the case of Baylies v. Sinex, 21 Ind. 45, in relation to the two sections: "It is evident that the 647th section, above set out, does not give a lien upon the engine or other machinery furnished as distinct from the building, but only upon the building or lot upon which it stands. The 648th section is somewhat obscurely worded, but it does not, as we think, extend the remedy given by the preceding section, but rather limits or qualifies it. It limits the remedy given by the preceding section, first, to cases where work has been done or materials furnished on new buildings; second, to cases where contracts have been entered into with the owners of buildings for repairs; third, to cases where engines or other machinery have been furnished, &c., to the owners of the land, excluding all contracts with tenants, except only to the extent of their interests. Its object was, undoubtedly, to prevent a tenant from encumbering property with liens, except to the extent of his interest in the property. Lynam v. King, 9 Ind. 3."

The legislature limited what would otherwise perhaps have been the effect of section 647, by providing in section 648, in substance, that tenants shall not encumber property with liens exeept as to their interest in the property, by requiring the contract for repairs to be made with the owner of the property and not with the tenant merely, or that the engine or other machinery be furnished to the owner, in order to create a lien as against his interest in the property, leaving the implication irresistible that where a new building is erected by the owner, whether he lets the work to a contractor or pursues any other mode of accomplishing the result, the person performing labor on or furnishing materials for the building, may have a lien whether the labor be performed for the owner or the materials be furnished directly to him or his contractor. The building must be erected by the authority and direction of the owner, in order that any lien may be acquired as against him. No one by committing a trespass upon another's land can acquire a lien upon it; nor can one, by furnishing materials for the erection of a building which the owner of the land has not authorized to be built, acquire such lien. But where the owner causes a building to be erected, whether he lets the work and the furnishing of the materials as an entire contract or pursues some other course, those performing labor on or furnishing materials for the building are entitled to a lien as provided for. This is in accordance with the plain and unequivocal provisions of the statute.

We shall, before closing this opinion, return to this proposition

again, but we will, for convenience, here notice the second question, as the first and second are in some degree blended together. Is the lien of the mechanic, laborer or material-man defeated by the payment to the contractor by the owner of the whole amount due the contractors, before notice of an intention to hold a lien has been filed? Section 650 provides for acquiring a lien by filing in the recorder's office of the county a notice of intention to hold a lien on the property, and that "the lien so created shall relate to the time when the work upon said building or repairs began, and to the time when the person furnishing materials began to furnish the same." We have already seen that by the provisions of section 647 the mechanic, laborer or material-man may have a lien, not to the extent of what may be due from the owner to the contractor, but "to the extent of the value of any labor done or materials funished, or for both." By the next section the lien of the material-man is made to relate to the time when he began to furnish materials. The extent of the material-man's lien being the value of the material furnished, and the time it attaches being the time when he began to furnish materials, it would, in our opinion, be an utter perversion of the law to hold that though he filed his notice within the prescribed time, yet his lien shall be defeated by full payment by the owner to the contractor before the expiration of the time limited for the filing of the notice. This proposition seems to us to be too plain to admit of much argument or illustration. That such payment should defeat the lien confounds all ideas of the force and legal effect of a lien. Indeed, if such is the case there is no lien, and the statute which attempts to confer it is a dead letter.

Many arguments have been pressed upon our consideration in respect to this point, as well as upon the question whether a lien can be acquired on account of work done for or materials furnished to a contractor and not the owner. The most of them are based upon the real or supposed hardships of the law, as we construe it, in this, that in many cases it subjects the owner to the liability of making double payments for the same work or materials, and prevents him from making contracts for the erection of buildings and the furnishing of materials therefor, to be paid for otherwise than in money, and other similar inconveniences. These arguments might have much force if addressed to the legislature, whose province is to make the laws, but can have little weight against the clear and unequivocal terms of a statute when addressed to a court whose province it is to determine what the law is, and not what it ought to be. The statute in question speaks for itself in unmistakable language. No arguments can change its significance. An act of the legislature is not of such plastic nature as that it may be moulded at pleasure by the courts into such form as will make it agree with the standard of expediency, or of right and wrong, which the judges may have created. When the legislative will has been clearly and constitutionally expressed, the courts have no alternative but to follow it. If an enactment is wrong or inexpedient the legislature may repeal or modify it, but it is not the province of the courts to avoid its effect by construction contrary to its plain intent and meaning. While much has been said against the statute, construed as we think it must be, much may be said in its favor. Its object is to secure to the mechanic, laborer or material-man, compensation for his work or materials. It prevents the owners of real estate from securing to themselves, without compensation, the benefits of the labor and the materials of others by means of low contracts with irresponsible, or perhaps dishonest contractors. The inconveniences of the law do not seem to us to be insuperable. The owner may withhold from the contractor, for the period of sixty days after the completion of the work, enough to protect the property from liens for work or materials. If full payment is made at the end of that time, it is perhaps quite as prompt as payments are usually made.

It is urged that inasmuch as section 649 provides that sub-contractors, journeymen, laborers and material-men may have a personal action against the owners for their work or material, by giving him the notice therein provided for, to the extent of what is due or may become due from him to the contractors, they should not be held to have the right to acquire a lien. We find nothing, however, in this section that, in our opinion, indicates an intent on the part of the legislature to withhold from them the right to acquire a lien as provided for in the two preceding sections. The contractor has the right to a lien and also to his personal action against the owner. The object of the law was to place the sub-contractor, journeyman, laborer and material-man upon the same footing with the contractor, except that the personal action against the owner in favor of the sub-contractor, etc., is limited by the amount that may be due or may become due from the owner to the employer, the lien given might be an inadequate remedy, as the property might be previously encumbered to an extent that would render the lien unavoidable; hence the right of a personal action against the owner is conferred to the extent indicated.

It has been urged that as the law had been in force for nearly twenty years before any one sought to place such construction upon it as would authorize a sub-contractor, etc. to acquire, a lien, such construction should not prevail; that the absence of any such attempt to acquire and enforce such lien, during so long a period of time, is evidence of general acquiescence that it can not be acquired. This argument has some force, but it can not prevail over the clear and explicit terms of the satute conferring the right. We are not aware that the question was ever raised in the state until the case of Barker v. Buell, *supra*. See also O'Hallaran v. Leachy, 39 Ind. 150. But new points frequently arise upon statutes a great length of time after their passage. Thus it was not until the year 1840 that the question arose in England whether a promise by the defendant to the plaintiff to pay to A. B. a debt which the plaintiff owed to A. B., was within the statute of frauds passed in the 29th year of CHARLES II, which was the year 1676. Thus the statute had been in force 164 years before the question arose. Eastwood v. Kenyon, 11 A. and E. 438; Smith on Cont., 5th ed., 108.

We have also been referred to some elementary books as authority that a sub-contractor, etc., can not acquire a lien under the statute set out. The statute never having received construction by the courts upon the point here involved, it is obvious that any comments upon it in this respect could only express the individual views of the party making them; and however much we may respect the authors referred to, we can not yield our convictions to theirs. Moreover, elementary books are often prepared with haste, and sometimes express views which the authors themselves would disclaim upon a fuller consideration of the subject.

There is a striking analogy between the statute and the principles of the civil law, including the maritime, in respect to liens. Thus, says Domat, vol. 1, p. 683, § 9, par. 1744: "Architects and other undertakers, workmen and artificers, who bestow their labor on buildings or other works, and who furnish materials, and in general all those who employ their time, their labor, their care, or furnish any materials, whether it be to make a thing or to repair it, or to preserve it, have the same privilege for their salaries, and for what they furnish, as those have who have advanced money for these kinds of works, and which the seller has for the price of the thing sold." The "privilege" of the seller is mentioned in a preceding section (4), p. 681, as follows: "He who has sold an immovable thing for which he has not received the price, is preferred before the other creditors of the purchaser and before all others, as to the thing that is sold. For the sale implied the condition that the purchaser should not be master of the thing till he had paid the price. Thus the seller, who has not received the price, may either keep the land or tenement if the price was to be paid before delivery, or he may follow it into what hands

soever it may have passed, if he has delivered it before payment."

There are in many of the other states statutes similar to that in question here. An elaborate and well prepared brief intended for another cause, has been filed in this, to which we are indebted for a reference to many decisions of other states under similar statutes. Those decisions are in harmony with the conclusions herein arrived at. It would extend this opinion to an unreasonable length to notice them all in detail, but a few may be glanced at. In the case of Parker v. Bell, 7 Gray, 429, it was held, under a statute not unlike our own, that a plasterer employed by a builder who has made a written contract with the owner of land to build a house thereon, is entitled to a lien on the house and land. The court say: "The object of the provision of the statute is to create and preserve to the laborer security for the payment of the wages which he earns. It is manifest, from a consideration of the provisions of the successive statutes in relation to the lien of mechanics upon the estates upon which their labor has been expended, that the legislature have regarded it as a sound principle, that all those who have by consent of the owner, or in pursuance of contract with him for that purpose, contributed to increase the value of his property, should have an interest in it until their respective claims for such services shall have been paid and discharged." In White v. Miller, 18 Penn. State, 52, it was held under the Pennsylvania statute, that one who furnished lumber and window sash to a contractor to be used in the erection of a building had a lien therefor. GIBSON, Ch. J., in delivering the opinion of the court, said: "As soon as owners of lots ceased to be their own builders, they put it in the power of persons employed by them to occasion losses to mechanics and material-men which they ought not to bear; and it was to remedy this mischief that the legislature established the principle that materials and labor are to be considered as having been furnished on the credit of the building, and not of the contractor. The principle is not only a just, but a convenient one. Whether the builder be the agent of the owner or an independent contractor, his appointment to the job creates a confidence in him which was not had before; and the consequence of a false confidence ought not to be borne by those who had no hand in occasioning it. Nor does the rule of the legislature bear hard on the owner. He has it in his power to detain the price of the building while there are outstanding charges against it, or to stipulate for security against those that might afterwards turn up; and if he uses common prudence, any loss which occurs will eventually fall on the author of it. If he do not, he can not charge the mechanic or material-man with the consequences of his own supineness. The adoption of these lien laws was imperfect, and they worked ill for the owner at first; but amended and expounded by experience, they work justly and well for all parties." See also the case of Lee v. Burke, 66 Penn. State, 336. So also in New York, under a statute certainly no more explicit than our own, it is held that a sub-contractor may acquire a lien for work and materials, and that the owner can not defeat the lien by a subsequent conveyance of the property. Blauvelt v. Woodworth, 31 N. Y. 285. See also Morrison v. Hancock, 40 Mo. 561; McCrea v. Craig, 25 Cal. 522.

In the case of Sodini v. Winter, 32 Md. 130, the court say, among other things, that "In a case like the present, of a material-man furnishing material to a contractor to be used in the erection of a building, the law contemplates a contract of purchase between these two, and that credit may be given to the latter, and whilst there is no contract express or implied between the founder and the owner, or credit given to the owner, yet the law provides a lien upon the building as a security for the material-man in case the contractor fails to pay for the materials; and this is done without affecting the liability of the contractor on his contract of purchase which still exists. Indeed, it was the liability to and frequency of loss sustained by mechanics and dealers in consequence of the employment of a middle-man or contractor which induced the legislature to give a lien on the building. Such being its character, and such the provision of law for its enforcement, the mere fact that the materials were furnished on the credit of the contractor, and not on the credit of the building, is not in our opinion either a waiver or extinguishment of the lien." In the case last cited proof was offered of payment in full by the owner to the contractor, but was rejected. This was held to be no error.

There are other authorities tending more or less strongly to sustain the lien; but we pass them over and proceed to the examination of those which seem to be relied upon to sustain the opposite views. The case of Spaulding v. Thompson, 27 Conn. 573, may be best stated in the language of the court in pronouncing the opinion. "The plaintiff," says the court, "by his bill, seeks to foreclose a mechanics' lien, which he claims, on the ground of his having furnished materials and rendered services in the erection of the defendants' church edifice. It appears, however, that the work was not done at the request of the defendants or even for their benefit. On the contrary, it was done against their express prohibition to the original contractors, and was also done after the contractors had been fully paid the contract price for the erection and completion of the whole church. Under the circumstances we cannot think the plaintiff entitled, as against the defendants, to any lien upon the church. It is true the language of the act of 1855 is very broad, but it could not have been intended to create a lien against a party who has not contracted either directly or indirectly for the work, but on the contrary, has expressly prohibited it." This case does not seem to us to militate essentially against the maintenance of the lien under a state of facts entirely different from those set forth.

The case of Hollingsworth v. Dow, 19 Pick. 228, involved nothing but a question of lien arising upon the principles of the common law, where a mechanic had been employed by a contractor to do certain work upon a machine, and had no application whatever to the question involved here.

In the case of Whitney v. Joslin, 108 Mass. 103, one Bourassee had taken a contract from Ebenezer L. Joslin to build a barn on land of his wife. Whitney & Sons had furnished Bourassee with material, who commenced the work but abandoned it before it was finished. Whitney & Sons then made a new contract with Emily J. Joslin, wife or widow of Ebenezer, whereby they agreed to finish the barn, etc., and she agreed, amongst other things, to pay them for the material they had furnished to Bourassee. It was held that if Whitney & Sons ever had any lien for material furnished Bourassee, they had waived it by the new contract. This case in no manner conflicts with the construction we place upon the statute.

The case of Wood v. Donaldson, 17 Wend. 550; S. C 22 Wend. 395, was this: One Russell contracted with Wood for the erection of a building, engaging to do the mason and carpenter work. Russell made a contract with Tingley whereby the latter engaged to do the mason work of the building as a sub contractor. Tingley absconded before the work was finished. Donaldson, the plaintiff in the case, was employed by Tingley, and did work and furnished material, for which he claimed to hold Wood under the lien law. The court say that the first section of the law gives color to the claim, but that the other sections of the act "clearly show that this new and extraordinary remedy was intended to be limited to the persons employed by him who contracted with the owner. The second section provides that the owner shall furnish his contractor with copy of the account, so that if there shall be any disagreement between him and his creditor, they may adjust the amount. By the next section, if the adjustment can not be amicably made, they shall submit the difference to arbitrators; and the fourth section declares that if the contractor shall not pay the sum found due to his cred-

itor, with costs, the owner shall pay the same out of the funds in his hands; and in case of default, it may be recovered in an action for money had and received, to the use of the creditor, etc. Nothing can be more explicit than these provisions, and they limit the right to a lien upon the funds of the contractor in the hands of the owner to *his creditors*—persons who have performed work, etc., under a contract with *him*." We agree with the decision in the cause, and all that was said by the eminent jurist delivering the opinion, NELSON, Ch. J., but we fail to see that it has any application whatever to the case here. There is nothing in any of the sections that follows those hereinbefore set out, that tends in the slightest degree to qualify them in respect to the point here involved, or to show that the legislature did not intend that the persons therein mentioned should have a lien as therein provided for.

In the case of McAlpin v. Duncan, 16 Cal. 126, the statute under which the decision was made is not set out or stated. The court say: "We think all that can be gathered from this act is, that material-men, sub-contractors, etc., have a lien upon the property described in the act to the extent (if so much is necessary) of the contract price of the principal contractor; that these persons must give notice of their claims to the owner, or the mere existence of such claims will not prevent the owner from paying the contractor, and thereby discharging himself from the debt; that by giving notice, the owner becomes liable to pay the sub-contractor, etc. (as on garnishment or assignment, etc.), but that if the owner pays according to his contract, in ignorance of such claims, the payment is good." The case does not seem to throw any light upon the question under consideration.

In the case of Knowles v. Joost, 13 Cal. 620, a statute is in part set out, which authorizes the owner, upon being served with proper notice, "to withhold from the contractor, out of the first money due, or to become due, to him, under the contract, a sufficient sum to cover the lien claimed by such sub-contractor, journeyman or other person performing labor or furnishing materials, until the validity of the lien shall be determined by the proper tribunals, if it be contested." It was held that "it was not the design of the legislature to make him responsible, except upon notice, or to a greater extent than the sum due the contractor at the date of the notice." We do not perceive that the case is at all in conflict with the construction we place upon our statute. By the statute copied in the opinion in the case cited, it would seem that the rights of the parties were to be determined by the state of things existing at the time of notice. Not so, however, under our statute, inasmuch as, if the notice is filed within the time limited, the lien relates back, as before shown.

The case of Jacobs v. Knapp, 50 N. H. 71, was an action of assumpsit for hauling wood, and a lien on the wood was claimed. The facts were that the wood belonged to the defendant, who had contracted with one Fifield to haul it. Fifield employed the plaintiff to haul it, there being no contract express or implied between the plaintiff and defendant. There was a statute which provides that "any person who labors at cutting, hauling, or drawing wood, bark, logs, or lumber, shall have a lien thereon for his personal services, which lien shall take precedence of all other claims except liens on account of public taxes, to continue sixty days after the services are performed, and may be secured by attachment." The court, after some discussion of the statute, say: "Upon the whole, therefore, we are inclined to the opinion that the lien of laborers in the class to which the plaintiff belongs, can attach *only* in case and by virtue of a contract, express or implied, *with the owners* of the property upon which the labor is bestowed." In a previous portion of the opinion the court, after having discussed the matter of liens in respect to buildings, says: "In such a case, to give not only the master-builder, but also all the various under-workmen, each an independent lien, without preference or precedence, upon the same property, would disastrously embarrass the useful construction of the work." This impracticability of giving separate and independent liens upon the same property "without preference or precedence" would seem to be the chief ground for the construction adopted, for the court proceed immediately to say: "In short, there would seem to be no practicable rule by which to interpert this statute, other than the one which should limit the subsistence of the lien to the party above who specially contracts with the owner of the property upon which the labor of the contractor and all his sub-contractors is expended." But this difficulty is entirely obviated by our statute, which makes provision for making all persons having such liens, parties to an action to enforce them, and if the property should not sell for sufficient to pay all, the proceeds of the sale are to be apportioned to each according to the amount due him. §§ 652, 653. The court, after speaking of the statutes of some other states, giving sub-contractors leins, say: "These provisions usuually require by way of proviso, that if the work is done under a contract with the owner, no person who may have done work or furnished materials for such contractor shall have the benefit of the lien, *unless* within a prescribed time after his employment by the contractor, *he shall give notice to the owner that he is employed, and will claim the benefit of the lien.*" It will be seen that the law in that case did not provide for any notice to the owner; which was, perhaps, a strong reason for the adopting the construction placed upon it; while our statute provides for notice by filing it in the recorder's office. The court say further: "Such a law as we have indicated, and have found in other jurisdictions, would, perhaps, be of public advantage. It would tend to protect the laborer against the fraud, dishonesty, or insolvency of owners and contractors; but if evils exist by reason of the present state of the law, the legistature alone can, and that body most effectually may provide the remedy." We learn from a note to the case that the legislature subsequently took action upon the subject; but we have not seen the enactment. Taking the case in New Hampshire altogether, we are of the opinion that it does not seriously conflict with the conclusion of the case before us.

It has been suggested that the statute, with the construction we place upon it, is unconstitutional, for the reason that the subject matter is not expressed in the title. This, we think, was settled by the case of Hall v. Bunte, 20 Ind. 304 In that case it was held that the statute giving the lien was one that conferred a remedy for a debt, and was valid. In that case the debt was against the party against whom the lien was sought to be enforced. Here the debts are not, but this, we think, makes no material difference.

For these reasons we are of opinion that the original plaintiffs and the cross-complainants were entitled to their liens, and that the liens were not defeatəd by the payment to the contractor. It follows that the judgment below at general term, reversing the judgment rendered at special term, was right, and must be affirmed.

The judgment below is affirmed with costs.

Legislative Power Over Municipal Corporations.

We are greatly indebted to the learned reporter of the Supreme Court of New Hampshire for the subjoined abstract of a recent decision of that court upon the extent of legislative power, under the constitution, over funds granted to municipal and public corporations.

The following letter from Mr. Shirley accompanied the abstract of the case:

OFFICE OF THE STATE REPORTER,
ANDOVER, N. H., MARCH 23, 1874.

EDITORS CENTRAL LAW JOURNAL:—I herewith send you an abstract of Spaulding v. Andover, decided March 13th, 1874. Its great length prevents my sending you a transcript of the entire opinion. It comments at length upon the views in Dillon on Municipal Corporations, and of Judge COOLEY

in his Const. Limitations. It occurred to me that the abstract might interest you, although the court forbore passing upon several other interesting points.

Very truly yours,

JOHN M. SHIRLEY.

CHARLES W. SPAULDING v. THE TOWN OF ANDOVER.

Supreme Judicial Court of New Hampshire, March 13th, 1874.

1. **Legislative Grant to Municipal Corporation a Contract.**—A fund granted to a municipal body by the legislature of a state, cannot be taken away or diverted to other purposes by subsequent legislation.

2. ——. Such diversion is prohibited by that clause of the federal constitution, which provides that "no state" shall pass any "law impairing the obligation of contracts."

3. **Dicta** in Darlington v. Mayor, etc., 31 N. Y. 164, disapproved.

The action was assumpsit for a re-imbursement state bond *or* the par value thereof in money, under the act of July 3, 1872.

At various times during the war the legislature of New Hampshire passed acts authorizing the several towns to raise money for the payment of bounties to those enlisting to fill their quotas. In this way the town of Andover, with other towns, incurred a large debt.

In 1870 and 1871 the legislature provided that from $2,000,000 to $3,000,000 in state bonds should be granted to such towns as a "reimbursement" for such war debts, and "in part payment" thereof, and a board of commissioners duly appointed for that purpose fixed the amount due each town, and the assignment of the same was duly made by them and entered by the state treasurer upon his books before July 3, 1872, and was duly reported by him as a liability of the state; but neither the specific bonds, nor the money in lieu of them had actually been taken by the town from the state treasury before the commencement of this and other suits. $100 00 was so assigned to Andover on account of the plaintiff.

The plaintiff enlisted early in the war, before towns paid bounties; afterwards re-enlisted; was counted upon the quota of the town; deserted while on his re-enlistment furlough; never returned; was never restored, and received no bounty from the town.

The act of July 3, 1872, provides that if "any town or city has received, or shall receive the sum of one hundred dollars or part thereof, either in money or bonds, for any person counted as part of the quota of such town or city, who has not received any bounty from such town, city or place, the sum of money or bonds received shall belong to and be the property of the person so counted, or his legal representatives, and may be recovered of such town or city in an action of *assumpsit*, as for money had and received."

At the October trial term, 1873, Chief Justice SARGENT directed a verdict for the defendants, and the judgment was reversed. The court unanimously decided that the act of July 3, 1872, was a "law impairing the obligation of contracts," and as such was prohibited by the constitution of the United States, and was therefore unconstitutional and void.

The opinion of the court by FOSTER, J., was an elaborate exposition of the two-fold public and private character of municipal corporations, and of legislative control over them.

The following are the concluding paragraphs of the opinion:

"By the act of 1870 the state granted to the town of Andover a certain amount of bonds to be devoted exclusively toward the re imbursement of the expenditures incurred by the town for war purposes during the rebellion, upon the basis that the amount of such bonds should be at the rate of $100 00 for every man furnished for the military service of the United States, after a specific period of time.

This was an unqualified, unlimited, unencumbered grant, possessing all the incidents of an executed and irrevocable contract, 1 Pars. Cont. 235.

A constitutional act of legislation, which is equivalent to a contract, and is perfected, requiring nothing further to be done in order to its entire completion, is a contract executed. Whatever rights are thereby created a subsequent legislature can not impair. If the proviso, condition or limitation, enacted in 1872, had been engrafted upon or made a part of the re-imbursement act it would, perhaps, have been binding, and the town would take the benefits of the act with its burdens. Potter's Dwarris on Statutes, 477.

The same rule applies to an obligation created by a constitutional law which is in the nature of an executory contract, if supported by a sufficient consideration.

The law of 1872, declaring a portion of the fund which had been solemnly granted to the town of Andover, to belong to and be the property of certain individuals, is invalid, as being contrary to that provision of the federal constitution, art. 1, § 10, which declares that no state shall pass any law impairing the obligation of contracts.

We have reached this result fully sensible of the duty which requires of the judicial branch of the government great circumspection in passing upon the validity of the acts and doings of the legislature, but mindful also of the paramount authority of the fundamental decree of the general government and of the necessity for the preservation and protection of the inestimable principle that has been invaded by the legislation which we are thus constrained to declare null and void.

We have not deemed it essential to comment upon the remarkable character of this legislation with regard to its assumption of judicial function. By declaring in express terms that a person counted on the quota of the town, who has not received a bounty, shall be entitled at all events to a portion of the reimbursement fund assigned to the town under a legislative grant, thus assuming to adjudicate concerning the validity of such person's claim in an *ex parte* hearing before a tribunal not recognized by the law, the legislature of 1872 certainly proceeded with a degree of boldness and assumption which was not generated in very profound or deliberate reflection.

This result renders unnecessary the consideration of all the other questions of law raised by the case transferred.

JUDGMENT ON THE VERDICT.

Legal News and Notes.

—GENERAL LEGGETT, commissioner of patents, has tendered his resignation.

—THE judiciary committee of the New York state assembly has reported favorably a bill providing that no person shall be confined in the county jail on arrest upon process in civil suits, unless there be paid by the person causing the arrest twenty-five dollars every twenty days for the board of the prisoner.

—THE senate has confirmed the following judicial nominations: William Wallace, to be United States district judge for the northern district of New York; Orange Jacobs, to be chief justice of the Supreme Court for Washington territory; Moses Hallett, to be chief justice of Colorado; Joshua G. Heath, to be United States attorney for New Hampshire.

—THE legislature of Illinois has passed an act providing that whenever a total loss shall occur upon any risk insured in that state (mercantile stocks excepted), the amount insured shall be taken and deemed the true value of the property at the time of such loss, and of the amount of loss sustained by the insured, and that the same shall be recovered without any deduction whatever. Similar bills have been before the legislatures of Illinois and Missouri, but we are unable at this writing to state the result.

—IN the course of the financial debate in the house on the 7th instant, Mr. Hoar, the late attorney general, disposed of the oft-repeated assertion that Justices BRADLEY and STRONG of the Supreme Court owe their appointments to the fact of a knowledge on the part of the President that they entertained opinions favorable to the validity of the legal tender act, by asserting positively that both of these gentlemen had been selected by the President before anything was known of the opinion of the court on that question.